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No. 92-10

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

CARLOS TREVINO AND
ISIDRO TREVINO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners, who sold counterfeit circuit breakers to a nuclear power plant, could be required under the Victim and Witness Protection Act to pay restitution that included the power plant's cost of procuring an alternative supply of power for its customers during the period the plant was shut down to replace the counterfeit circuit breakers.

2. Whether the restitution order was improper because neither the criminal information nor the plea agreement informed petitioners of the amount of restitution that might be ordered under the Victim and Witness Protection Act.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is unpublished, but the judgment is noted at 956 F.2d 276 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1992. A petition for rehearing was denied on April 8, 1992. Pet. App. B1. The petition for a writ of certiorari was filed on June 29, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After entering guilty pleas in the United States District Court for the Central District of California, petitioners were convicted of two counts of trafficking in goods bearing counterfeit labels, in violation of 18 U.S.C. 2320. Petitioners were each fined $5,000 and placed on probation for concurrent terms of three years on each count. As a condition of probation, each petitioner was ordered to pay restitution in the amount of $659,401.50. Gov't C.A. Br. 3. The court of appeals affirmed.

1. Petitioners owned and operated two related businesses, California Breakers, Inc., and Anti-Theft Systems, Inc. Both companies were in the business of purchasing circuit breakers for resale. In some instances, the companies altered previously used circuit breakers by recalibrating the breakers or changing their amperage ratings. Petitioners then unlawfully placed counterfeit manufacturers' labels and Underwriters' Laboratory labels on the breakers to give them the appearance of being new and of being approved at the designated amperage ratings. Gov't C.A. Br. 4-5. One set of breakers unlawfully bearing counterfeit labels was sold by petitioners' company, Anti-Theft Systems, Inc., to Pacific Gas and Electric Company for use at the Diablo Canyon Nuclear Power Plant. Those breakers were not used in the plant, because they were determined not to be of the proper type. Gov't C.A. Br. 6. An investigation of those breakers led to the discovery that petitioners' other company, California Breakers, Inc., had sold counterfeit circuit breakers in 1985 for use

in the Palo Verde Nuclear Generating Facility in Phoenix, Arizona. *Id.* at 7.

The breakers sold by petitioners were installed in a key safety system at the Palo Verde Nuclear Generating Facility. They were examined and were found to have been subjected to unauthorized tampering and modification. The Palo Verde management decided to shut down the facility for two days to replace the potentially defective breakers. As a result of the shutdown, the Palo Verde Nuclear Generating Facility incurred a loss of $1,318,803. That loss included $20,805 to replace the breakers and switches involved, $64,168 for engineering, quality assurance, and other support directly related to the replacement of the breakers, and $1,233,830 to purchase, for supply to its customers, electric power that otherwise would have been generated by the plant during the two days that the plant was out of operation. Gov't C.A. Br. 7-8.

2. In January 1990, petitioners agreed to plead guilty to a two-count information charging them with trafficking in counterfeit goods, in violation of 18 U.S.C. 2320, based on their sales of counterfeit-labeled circuit breakers to the Diablo Canyon and Palo Verde facilities. In exchange for petitioners' guilty pleas, the government agreed not to prosecute them further for their business activities involving the sale of falsely labeled circuit breakers and to recommend a sentence of probation. C.A. Excerpts of Record 6. The plea agreement specified that "[i]t is understood that there is no agreement between the government and [petitioners] concerning (a) the amount of any fines and/or restitution, if any, which the government may recommend." *Id.* at 7. Neither the information nor the plea agreement advised peti-

tioners of the amount of restitution that might be ordered in the case.

The presentence report recommended that restitution in the amount of $1,318,803 be awarded to compensate for the loss incurred by the Palo Verde facility as a direct result of petitioners' offense. Petitioners objected to any restitution order, arguing that they were not directly responsible for the losses suffered by the Palo Verde facility. After a hearing, the court accepted the calculation in the presentence report and ordered each petitioner to pay restitution in the amount of $659,401.50, as a condition of probation. Pet. App. A6; Gov't C.A. Br. 9.

3. Petitioners thereafter filed a motion in district court to correct their sentences under Fed. R. Crim. P. 35(a). They argued that the $1,233,380 cost to the Palo Verde facility of purchasing replacement power during the two-day plant shutdown was not the type of loss for which restitution was authorized under the Victim and Witness Protection Act of 1982 (VWPA), 18 U.S.C. 3663. The district court rejected petitioners' claim, finding that "[t]he replacement power losses in the instant case are directly * * * caused by the offenses to which [petitioners] pleaded guilty." C.A. Excerpts of Record 13.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A8. The court noted that petitioners did not challenge the computation of any of the restitution amounts. Rather, they objected only to paying restitution for the cost of the replacement power that the Palo Verde facility purchased during the shutdown. That sum, they claimed, was tantamount to "revenue loss" for which the statute did not authorize restitution. *Id.* at A7. The court rejected petitioners' argument, ruling that "[t]he

cost of replacement power is not revenue loss. [Petitioners'] conduct caused the facility to shut down, which necessitated the purchase of replacement power. Accordingly, the purchase of replacement power was not too remote to form the basis for restitution." [1] *Id.* at A7-A8.

ARGUMENT

1. Petitioners argue (Pet. 10-11) that the cost of purchasing replacement power for the power plant's customers during the two-day shutdown is a type of property loss for which the VWPA does not authorize restitution. A straightforward reading of the statute reveals this contention to be incorrect. The cost of purchasing replacement power in this case is properly characterized as a "loss * * * of property" (18 U.S.C. 3663(b)(1)) incurred as a direct result of petitioners' offense. As such, it was correctly included in the restitution order.

As this Court recognized in *Hughey* v. *United States*, 495 U.S. 411, 416 (1990), the VWPA seeks to restore the victim to its position before the crime. The VWPA, 18 U.S.C. 3663(b), provides that, "in the case of an offense resulting in * * * loss * * * of property of a victim of the offense," the court may order a defendant to pay restitution in the amount of the "value of the property on the date of the * * * loss."

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[1] In light of its ruling that the VWPA authorized the restitution order, the court did not reach petitioners' arguments concerning the scope of restitution permitted under the Federal Probation Act. See Pet. C.A. Br. 10-12; Pet. App. A8; see also Pet. 18-21.

In this case, the Palo Verde plant was forced to shut down for two days to remove the counterfeit and potentially defective circuit breakers supplied by petitioners. The need to shut down was the direct result of petitioners' offense, which led to the installation of the defective circuit breakers. One of the expenses incurred in the shutdown was the cost of power to supply the plant's customers—power that ordinarily would have been generated by the plant, but which had to be procured elsewhere because of the shutdown. The cost of the replacement power is not materially different from the other out-of-pocket expenses incurred by the Palo Verde facility as a direct result of petitioners' offense. Thus, the restitution ordered for that amount accords with both the letter and the purpose of the VWPA.[2]

Petitioners characterize the amounts expended to purchase replacement power as a form of "lost revenue" or "lost income" that cannot be recovered as restitution under the VWPA. In support of their argument, they note that the statutory provision dealing with restitution for "bodily injury" explicitly authorizes reimbursement to the victim "for income lost" as a result of the offense, 18 U.S.C. 3663(b)(2),

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[2] The Ninth Circuit has held that restitution for economic loss under the VWPA is limited to losses "directly caused" by the offense of conviction. See, *e.g.*, *United States* v. *Koenig*, 952 F.2d 267, 275 (1991); *United States* v. *Kenney*, 789 F.2d 783, 784, cert. denied, 479 U.S. 990 (1986). Petitioners have not challenged the district court's and court of appeals' determination that the shutdown of the Palo Verde facility and the replacement of the counterfeit circuit breakers was "directly caused" by the offense of conviction; nor have petitioners challenged the calculation of the amounts expended by the facility as a direct consequence of the plant shutdown.

but that the provision governing restitution for property loss does not specifically mention recovery of lost income. By implication, they maintain, that type of economic loss cannot be recovered under the Act.

Petitioners' argument fails. Even assuming that the statute does not permit restitution for lost income on property,[3] the cost of replacement power in this case cannot properly be characterized as "lost revenue" or "lost income." As petitioners acknowledge (Pet. 17), the Palo Verde facility did not lose income: its customers paid for the electricity they received during the two-day shutdown. As a result of the shutdown, however, the facility incurred additional out-of-pocket costs: it was required to purchase substitute electrical power for its customers, since it could not generate its own. That added expense constituted a direct economic loss to the power plant, and was properly included in an order of restitution.[4]

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[3] As petitioners note, the Section of the Act dealing with bodily injury enumerates the specific types of expenses that can be included in an order of restitution, including the costs of medical and personal care, see Section 3663(b)(2)(A) and (B), and lost income, see Section 3663(b)(2)(C). The property loss provision, however, does not itemize the types of property losses that are recoverable; rather, it refers generally to "damage to or loss or destruction of property of a victim of the offense." Section 3663(b)(1). Since, in this case, the Palo Verde facility presumably continued to receive revenue during the shutdown period as payment for the power it purchased and supplied to its customers, this case does not present the question whether loss of revenue or income on property can fairly be regarded as a form of "property loss" for which restitution is available under the VWPA.

[4] To the extent that the Palo Verde facility's cost of generating electric power would have been less than the cost

2. Petitioners also argue (Pet. 18-23) that the restitution award was improper because it involved a substantial amount of money that was not identified in either the plea agreement or the criminal information. That point was not passed on by the court of appeals, because petitioners advanced that argument only with respect to the validity of the restitution award under the Federal Probation Act, and the court of appeals upheld the award under the VWPA. In any event, the argument has no merit.

There is no provision in the VWPA requiring that the amount of restitution be stated in the formal charging documents. Section 3664, which specifies the procedure for issuing an order of restitution, explicitly provides that the court shall resolve any dispute as to "the proper amount or type of restitution" by the preponderance of the evidence, and that the government has the burden "of demonstrating the amount of the loss sustained by a victim as a result of the offense." Section 3664(d). That Section contains no requirement that the amount of loss be stated in the charging instrument or in the plea agreement.

To the contrary, Section 3664 contemplates that the loss to the victim will be investigated and calculated by the probation officer, and included in the presentence report. See Section 3664(b). The Act requires that the court disclose the relevant portions of the presentence report to the defendant and the government prior to the sentencing proceeding. Section 3664(c). Those procedures would not be included in

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of purchasing replacement power from other generators (as it presumably was), the facility also lost profit during the two-day shutdown. But the restitution order did not require petitioners to pay for any lost profit.

the Act if the amount of loss to the victim were required to appear in the charging instrument or the plea agreement before it could form the basis of a restitution order.

Petitioners do not cite any court decision holding that the VWPA requires that the charging instrument or the plea agreement recite the amount of loss that will be the basis of the restitution order, and we have found none. *United States* v. *Whitney*, 785 F.2d 824, amended and reh'g en banc denied, 838 F.2d 404 (9th Cir. 1988), and the cases cited therein on which petitioners rely (Pet. 18-19), dealt with restitution under the Federal Probation Act, 18 U.S.C. 3651, which did not include any procedure for determining the restitution amount. To assure "certainty" and "fairness," 785 F.2d at 825, in the calculation of restitution awards under the Federal Probation Act, the courts imposed a requirement that the amount of restitution be alleged in the charging instrument or set forth in the plea agreement. But the VWPA differs from the Federal Probation Act by including specific procedures for determining the amount of the restitution. See 18 U.S.C. 3664; *Whitney*, 838 F.2d at 404 n.1. There is thus no basis for importing into the VWPA the requirement engrafted onto the Federal Probation Act that the indictment allege or the plea agreement stipulate the amount of the loss caused by the offense of conviction.

Other cases cited by petitioners (Pet. 22-23) all deal with circumstances in which the failure to state the amount of restitution materially altered the basis of the plea agreement, so that ordering restitution in the amount involved constituted a breach of the plea agreement. See *United States* v. *Kramer*, 781 F.2d 1380, 1388-1389 (9th Cir.), cert. denied, 479 U.S.

819 (1986); *United States* v. *Burruezo*, 704 F.2d 33, 38 (2d Cir. 1983); *United States* v. *Garcia*, 698 F.2d 31, 35-37 (1st Cir. 1983); *United States* v. *Runck*, 601 F.2d 968, 969-970 (8th Cir. 1979), cert denied, 444 U.S. 1015 (1980). Petitioners' plea agreement specifically stated that the agreement did not address the amount of restitution that might be ordered. Thus, the restitution order in this case did not violate the agreement, and petitioners cannot claim that the agreement misled them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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